82-1434

No.

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

RICKY A. KNAPP,
Respondent.

Petition for Writ of Certiorari to the New York State Court of Appeals

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Questions Presented for Review.

1. Whether the admission into evidence at trial of the defendant's statements constituted constitutional harmless error in view of the overwhelming evidence of guilt.

2. Whether the admission of the defendant to an informant provided a legal basis for the issuance of a search warrant. If not, does the exclusionary rule require that the evidence be suppressed?

Table of Contents.

Page

Index to Appendix.

TABLE OF AUTHORITIES.

CONSTITUTION:

STATUTES:

CASES:

Page

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Petitioner, the People of the State of New York, respectfully prays that a Writ of Certiorari be issued to review the judgment of the New York State Court of Appeals.

Opinion Below.

The Court of Appeals of the State of New York issued its opinion in this case on October 13, 1982, and it may be found at _____ N. Y. 2d _____ (1982). The divided Court held in its opinion that the judgment of conviction should be reversed and a new trial granted on the grounds,

inter alia, (a) that the defendant's confession was improperly admitted into evidence, such error not constitutional harmless error; (b) that evidence seized from the defendant's automobile under a search warrant must be suppressed since the search warrant was based on the admission by the defendant to a police informant, which admission was obtained in violation of the defendant's consitutional rights.

In holding that the defendant's statement to the New York State Police was inadmissible, the Court found that counsel had entered the proceeding such that the defendant could not waive his right to counsel absent counsel. The admission of this evidence was not constitutional harmless error despite the overwhelming evidence of the defendant's guilt, since it had a direct bearing on the verdict of the jury.

In addition, the Court found that the search warrant issued on the basis of information given by the defendant to a "police informant" was improper, as a result of which any evidence seized under that search warrant should have been suppressed. Although the Court recognized that the "informant" did not engage the defendant in *custodial interrogation*—if interrogation at all—it held that the "informant" was, in fact, an agent of the police at the time of his conversation with the defendant. Since the "informant" was an agent of the police, counsel had entered the investigation on the part of the defendant, the defendant could not make legally admissible statements to the "informant" absent a waiver of counsel in the presence of his attorney.

Since the search warrant issued by a local magistrate was based upon the oral testimony of the "agent," which

testimony included reference to the admissions made by the defendant to Hitt, the Court of Appeals suppressed all physical evidence seized pursuant to the warrant applying the "fruits of the poisonous tree" doctrine.

The Appellate Division of the Supreme Court of the State of New York, by decision dated June 18, 1981, had affirmed the defendant's conviction for Murder in the Second Degree, finding that the admission of the defendant's statement to the New York State Police was harmless, constitutional error. This Court found no merit to the other arguments advanced by the defendant, including the "agency" theory and his attack on the evidence seized pursuant to the search warrant.

A copy of the opinion of the Appellate Division as well as a copy of the opinion of the Court of Appeals is appended to this petition.

Jurisdiction.

The opinion of the New York State Court of Appeals was rendered on October 13, 1982. Thereafter, on November 9, 1982 a motion for reconsideration and reargument was filed by petitioner which was denied by order of the Court of Appeals on December 14, 1982. This petition is filed within sixty days of the order denying the motion for reargument and reconsideration.

The jurisdiction of the Supreme Court of the United States to hear this case is invoked under 28 U.S.C. 1257(3) since the respondent has specifically set up and throughout asserted violations of his rights under the Constitution of the United States.

Constitutional Provision Involved.

United States Constitution Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

On the evening of December 9, 1977, Linda Jill Velzy, an eighteen-year-old female student at the State University at Oneonta, New York, disappeared. Her disappearance was initially reported to the campus Security Police, who notified the Oneonta Police Department. Eventually, these agencies, in addition to the New York State Police, conducted a joint investigation into the disappearance of Miss Velzy. It must be noted that at the outset that no information was available which could have led the police to believe that foul play was involved in her disappearance.

On December 12, 1977 one Ricky A. Knapp approached Arthur Hitt requesting an alibi for the evening of December 9. Hitt, then under Indictment in Otsego County, concluded that this information may be valuable to the police in terms of their search for Linda Velzy and thus contacted his attorney. Hitt's attorney then approached the police willing to exchange what he had for lenient treatment on the pending charges. On December 20, 1977 a conference was held in the Chambers of the Otsego County Judge under which Hitt would be afforded certain treatment if he developed information useful in the Velzy investigation.

Then Hitt repeatedly sought whatever information his friend Knapp had concerning the girl. Hitt's activities were monitored by the New York State Police, including the use of a remote recording device during some of the conversations with Knapp. Ultimately, Knapp advised Hitt during a ride from Binghamton, New York that he had picked up the girl hitchhiking on West Street in Oneonta, had sex with her, killed her and buried her body in the snow in a remote area of Delaware County. Hitt reported this information to his police contact. Knapp did not reveal the location of the body to Hitt at that time.

Hitt again met Knapp and suggested that the body be disposed of at the site where Hitt was then logging in Otsego County. Knapp agreed to this suggestion and they both prepared a burial pit deep in the woods using Hitt's logging equipment. In the secrecy of night on January 1, 1978 Hitt and Knapp went to get the corpse from its snowy grave in Delaware County. Upon receiving word from Hitt that they were about to move the body, members of the Bureau of Criminal Investigation secreted themselves in the vicinity of the freshly prepared burial pit. Knapp finally appeared dragging the frozen dead body of Linda Jill Velzy to its intended final resting place. Upon his arrest, the defendant, Knapp, is reported to have spontaneously said "I killed her," "I killed her," "I am sick, please shoot me."

Knapp was taken to New York State Police headquarters where, after being advised of his Miranda rights, he made an oral statement and a three-page typewritten statement. Meanwhile, Hitt was presented to a local magistrate and gave testimony under oath in support of an application for a search warrant against the defendant's

automobile. The search warrant was issued and substantial evidence was found linking the defendant to the deceased.

The Otsego County Grand Jury returned a two-count Indictment charging Knapp with Murder in the Second Degree under Section 125.25(1) of the Penal Law of the State of New York and Murder in the Second Degree under Section 125.25(2) of the Penal Law of the State of New York. Following a jury trial, the defendant was convicted of Murder in the Second Degree under Section 125.25(2) of the Penal Law of the State of New York.

The defendant appealed to the Appellate Division, Third Judicial Department, which affirmed the judgment of conviction on the grounds that admission of the confession was constitutional, harmless error, one Justice dissenting. Leave to appeal to the Court of Appeals was granted, which Court found, *inter alia*, that the admission of the confession was not constitutional, harmless error, reversed the conviction and ordered a retrial. A motion for reargument and/or reconsideration was presented to the Court and ultimately denied.

REASONS FOR GRANTING THE WRIT.

A. The admission of the defendant's confessions, both oral and written, was constitutional, harmless error in view of the overwhelming evidence of guilt.

Error of constitutional proportions may be harmless when it is clear, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction. *Chapman vs. California,* 386 U. S. 18, 23-24 (1967); *People vs. Crimmins,* 36 N. Y. 2d 230 (1975). Unavoidable error in a

jury trial on the merits is a fact of life, however, the mere presence of error does not mandate a reversal of the conviction if that error is harmless. The question then becomes whether it can be said that there is no reasonable possibility that the erroneously admitted confession contributed to the defendant's conviction.

This Court has held in *Milton vs. Wainwright,* 407 U. S. 371 (1972), that unconstitutionally obtained self-incriminating statements admitted as evidence at trial could be considered harmless error if the other evidence of the defendant's guilt was overwhelming (see, *Harrington vs. California,* 395 U. S. 250 [1969]). In the case at bar, absent the written confession of the defendant, the evidence of the defendant's guilt is overwhelming. Although the totality of the evidence in the record will not be set forth, the following conclusively established facts demonstrate, unequivocally, guilt:

(a) possession of the frozen body of the deceased on January 1, 1981 as the defendant dragged it to the new grave site;

(b) the spontaneous declaration of the defendant that "I killed her," "I killed her," "I am sick, please shoot me";

(c) the medical evidence presented as to cause of death;

(d) the request for an alibi made to Arthur Hitt;

(e) other circumstantial evidence linking the defendant to the deceased;

Additional evidence of the defendant's guilt, suppressed by the Court of Appeals, further eliminates any doubt of guilt such as:

(a) the confession to Hitt as to the method of killing the girl;

(b) the physical evidence seized from the defendant's car, under a search warrant, including the contact lens, the wood chips, etc.

B. The evidence obtained by Arthur Hitt from the defendant was properly admitted into evidence at trial. Under the circumstances herein the Court of Appeals conclusion that Hitt was a police agent is patently incorrect.

The defendant made a full oral confession to Arthur Hitt. In reversing the conviction, the Court of Appeals summarily characterized Hitt as a police agent under CPL 60.45(2). It is submitted to this Court that if such a holding is proper, the efforts of law enforcement in investigating criminal activity will be thwarted since the technique of "informant" will no longer be available.

The record clearly indicates that Hitt was not a police agent as that term is employed in CPL 60.45(2). The statute was enacted to prohibit the police from hiring private citizens to perform tasks, such as conducting searches or obtaining incriminating statements, that they themselves could not constitutionally perform. Implicit in this agency theory is solicitation of the private individual by the police and knowledge on behalf of the police that any evidence they could obtain would be constitutionally inadmissible. The Appellate Division, in affirming the conviction, did not feel that this issue was worthy of comment.

No specific defination of the term "agent" is found in the law of the State of New York. New York State's

highest Court has repeatedly declined to define any yardstick to determine whether, in fact, and in law an individual is an agent for the police under any particular set of circumstances. *People vs. Cardona,* 41 N. Y. 2d 333 (1977).

A proper inquiry relative to the determination of "agency" requires an examination of the intent of the police. It is submitted that without an intent on the part of the police to have a private person engage in conduct which they themselves could not engage in, the rules of "agency" should not apply. The use of informers is a well recognized investigating tactic of law enforcement. For example, it is common for police agencies to employ informers in the detection and apprehension of narcotics dealers. The decision in this case severely affects police use of informant's undercover operatives since those individuals may be considered "agents" thus requiring the suppression of any evidence monitored the activities of Hitt insofar as they are related to this defendant. Any police officer when placed in a situation such as this, would be remiss if he did not participate with the private person in an effort to secure and memorialize the information. It is respectfully submitted that police assistance to the private person in his endeavor to ferret out information is not determinative in and of itself of the agency issue since this would occur in all cases under which a private person approached a law enforcement agency with information.

Massiah vs. United States, 377 U. S. 201 (1964) does not compel a contrary result. In *Massiah* the defendant had been indicted for a violation of Federal narcotic laws. He had retained an attorney as a result of the indictment and was free on bail pending his trial. Pending trial the police

surreptitiously obtained incriminating statements made by the defendant through the use of an individual who cooperated with the government in their continuing investigation of the narcotics activities of the defendant. In order to obtain the incriminating statements the private person allowed the police to install an electronic surveillance device in his automobile such that any conversation in which he engaged with the defendant could be monitored.

Did the New York State Police use Hitt in order to vitate the defendant's constitutional rights? The answer is clearly, no. Accordingly, Hitt cannot be categorized as an agent for the purposes of CPL 60.45, a statute which is designed to protect the constitutional rights of the defendant insofar as they relate to the admission into evidence of any statements, admissions or confessions that he may make to a private person. The finding of Hitt being an agent to the New York State Police is contrary to fact and law.

The finding of Mr. Hitt as an agent of the New York State Police does not hinge on the entry of an attorney if such occurred in this case. First, and perhaps of critical importance, is the fact that the police agency did not know that Miss Velzy had been the victim of any criminal activity. Nor had a criminal proceeding commenced under the rules as we now know them to be. In December of 1977, the police could not have been aware of the decision in *People vs. Rogers,* 48 N. Y. 2d 167 (1979), or *People vs. Skinner,* 52 N. Y. 2d 24 (1980). Therefore, it cannot be argued that the use of Hitt was merely an attempt by the New York State Police to subvert the constitutional rights of Knapp if indeed Owen had entered the proceedings and in fact represented the defendant. This case is wholly

dissimilar from *People vs. Skinner, supra,* a case in which the police were aware of criminal activity and had been investigating the alleged criminal activity of the defendant for a period of approximately two years. It is clear in the *Skinner* case that an attorney had entered the proceeding, as a result of which, the non-custodial admissions of the defendant were inadmissible. If Hitt is not factually and legally an agent of the New York State Police, clearly the defendant's admissions to Hitt, are admissible at trial.

If Hitt is not an agent of the police, the admissions made by the defendant to Hitt are legally admissible, as a result of which, the search warrant and the fruits thereof are not the fruits of the poisonous tree.

The determination of this question is of crucial importance to the majority's determination. The interests of justice require that the Court analyze this issue and determine, as a matter of fact and law, whether Hitt was an agent. To conclude without discussion that Hitt was an agent for the police implies that this Court failed to adequately consider this crucial issue.

If Hitt is indeed an agent of the police under these circumstances, the public will again be the loser and law enforcement will be presented with another serious dilemma. How are law enforcement personnel to determine those circumstances under which an individual who, though unsolicited, desires to provide information to the police regarding criminal activities of another? It is exceedingly important for this Court to review the conclusory determination that Hitt was, in fact and in law, an agent, not only in terms of the present case, but also to serve as a future hallmark for law enforcement. Arguably, every person in the future who goes to the police with information concerning criminal activities and desires to

cooperate with the police in their investigation of those criminal activities can be categorized as an agent of the police. Surely this is not the goal of the constitutional rule but merely acts as a deterrent to the citizens of the State of New York to cooperate with and assist law enforcement personnel in their ever ceasing goal to ferret out crime. Citizens who view this determination as a stifling of citizen interaction in police efforts will be far more reluctant to come forward in the future despite the fact that reporting criminal behavior is expected or even demanded of the ordinary citizen. Furthermore, such a conclusion deters the police from using private citizens in criminal investigations in any capacity, further limiting their ability to promptly and efficiently gather evidence concerning criminal activities for use at trial.

C. The time is ripe for this Court to review the exclusionary rule, not only as to search and seizure, but also as to confessions.

Intertwined with the inadmissible confessions is the doctrine of the "fruits of the poisonous tree" as it relates to the issuance of search warrants. Since the search warrant issued in this case was based on an illegally obtained confession, the products of the search warrant were suppressed. *Wong Sun vs. United States,* 371 U. S. 471 (1963). The application of the exclusionary rule in such cases defeats the purpose of criminal trials and the objective of the Fourth Amendment.

The announced purpose of the exclusionary rule is to deter the police from engaging in illegal conduct in order to secure evidence. If the police in good faith reliance on a search warrant obtained evidence of a crime without any misconduct no rational justification exists for the exclusion of that evidence from the trial. The result is often

allowing the guilty to go free. There is no rule of law presently in effect which undermines the integrity of the criminal justice system and the faith of the public in that system as the exclusionary rule. The public is, in effect, punished for the reliance of the Police on the judgment of the issuing magistrate and for following the mandates of the Fourth Amendment.

It is not suggested that obtaining a warrant automatically insures that the exclusionary rule will not ultimately be applied. However, there are circumstances such as reliance, inevitable discovery, good faith, attenuation, live witness and the like which require that the exclusionary rule not operate to exclude evidence. This Court has previously recognized such instances. As this Court stated in *Wong Sun, supra,* 371:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal action of the police. Rather, the more apt question in such a case is 'whether, granted establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

In *Brown vs. Illinois,* 422 U. S. 590 (1975), Justice Powell suggested a sliding scale approach to the exclusionary rule:

> "Those most readily identifiable are on the extremes: the flagrantly abusive violation of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the

other. In my view, these extremes call for significantly different judicial responses."

To effectuate the avowed purpose of the rule, evidence from a search should be suppressed only if it can be said that the law enforcement personnel had knowledge, or may be charged with knowledge, that the search was constitutional under the Fourth Amendment. *United States vs. Peltier,* 422 U. S. 531 (1976).

Here, the police relied on a search warrant issued by an impartial magistrate without any knowledge that the evidence submitted in support thereof was or could be constitutionally defective. Furthermore, it is obvious that if the police had recognized this face the application could have been based on other legal evidence in their possession at that time. To exclude such evidence in the truth seeking process reaches the heights of absurdity.

Conclusion.

The People of the State of New York ask this Court to grant this petition and issue a writ of certiorari to review the decision of the Court of Appeals. This is the appropriate occasion for this Court to reexamine the "exclusionary rule" as it applies to confessions and search and seizure.

Respectfully submitted,

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APPENDIX A.

Court of Appeals Opinion.

STATE OF NEW YORK

COURT OF APPEALS

3 No. 390

THE PEOPLE &c.,

Respondent,

v.

RICKY A. KNAPP,

Appellant.

(390) John H. Owen, Cooperstown, for appellant.
Colin E. Ingham, Otsego County, for respondent.

JONES, J.:

Incriminating statements made by defendant to the police after they had been informed that he had an attorney, as well as physical evidence thereafter seized from his automobile, must be suppressed as obtained in violation of his state constitutional right to counsel. The erroneous admission of this evidence cannot be regarded as

harmless, nor can it be concluded on this record that the evidence was admissible on any theory of an emergency exception to the right-to-counsel rule as now advanced by the dissenters.

Linda Jill Velzy, an 18-year-old student attending the State University College of Arts and Sciences at Oneonta, was last seen alive at approximately 6:00 p.m. on Friday, December 9, 1977. She had just finished visiting several young women who were seeking another roommate to share their apartment. On leaving she told them that she would walk back to the college campus or perhaps hitch a ride. She was reported missing by her roommate the following day. An intensive search was begun and carried out as a missing person investigation. The New York State Police, the Oneonta City Police and the College Campus security guards joined forces, coordinating their efforts and establishing a single command post in the Municipal Building on Main Street in the City of Oneonta. A search was made of the surrounding countryside and woods which included the use of helicopters and bloodhounds. The police interviewed and questioned over a hundred people, including defendant.

When he was questioned defendant informed the investigating officers, Detectives Angellotti and Dabreau of the Oneonta Police, of his whereabouts on the evening of December 9th and denied any knowledge of the Velzy disappearance. During the course of this conversation, at the request of the officers, defendant agreed to submit to a polygraph examination. The police thereafter from time to time continued to question defendant and communicated with his family.

Defendant at the time was under indictment returned by the November, 1977 Grand Jury in which he was charged with sodomy in the first degree and unlawful imprisonment in the first degree. He had been arraigned on these

charges on November 9, 1977 and at that time had appeared with his attorney, John H. Owen, Otsego County Assistant Public Defender, although the latter had not then been formally appointed to represent him. Defendant again appeared on this indictment before the Otsego County Court on December 12, 1977 on an application to relieve the Public Defender and to permit defendant to retain counsel of his own choosing. The Court granted defendant two weeks to obtain an attorney and adjourned the matter to December 28, 1977.

As a consequence of the earlier police request that defendant take a polygraph examination, he contacted Attorney Owen, who advised him not to submit to the test. The police continued questioning of defendant on December 12, 13 and 15, until on December 15 or 16, attorney Owen telephoned Detective Angellotti, informed him that he had advised his client not to take the polygraph test, and directed that the police either arrest defendant or cease their harrassing questioning of him.

Although direct attempts to question defendant ended in compliance with Owen's demand and were not resumed until after defendant's subsequent arrest, later that month members of the consolidated investigating team arranged to question defendant indirectly through an informer named Arthur Hitt. During the course of the missing person investigation Hitt's attorney had approached the State Police indicating that his client possessed certain information with respect to the Velzy matter. Hitt, the owner of a logging site, for whom defendant occasionally worked, faced pending felony charges. The police were told by Hitt that on Monday, December 12, defendant had asked him to tell anyone who might inquire that he was with Hitt until 8:00 p.m. on Friday, December 9, the evening of Miss Velzy's disappearance. Although defendant did not then tell Hitt why it was important for him to establish an alibi

for that Friday evening, Hitt reported the incident to his own attorney. Thereafter (and after attorney Owen had expressly directed the police to cease questioning defendant about the Velzy matter), on December 21 at a conference in the chambers of the County Court Judge attended by the judge, the prosecutor, Hitt and Hitt's attorney, it was agreed that Hitt would be permitted to plead guilty to charges not requiring incarceration and would, in fact, not be sentenced to incarceration, in exchange for his cooperation in the Velzy investigation, provided such cooperation led to the arrest of at least one person criminally responsible for Velzy's disappearance. Hitt's attorney testified that he understood the objective at the time to be "to get Knapp".

During the next ten days, Hitt made several telephone calls to defendant which were recorded by state police investigators. In the same period the state police also outfitted Hitt with recoding equipment for several face-to-face meetings with defendant. In only two of these more than half dozen recorded conversations was any relevant or incriminating statement made. Defendant twice repeated his request, without elaboration, that Hitt support defendant's alibi for Friday evening, December 9. In exchange for Hitt's agreement to do that, defendant agreed to support an alibi for Hitt's own pending unrelated charges.

On December 31 the case finally broke open when it was disclosed why it was that defendant wanted an alibi for December 9. It was then that defendant confirmed to Hitt that he had killed Linda Velzy. In an unrecorded conversation, defendant related that he had picked up the Velzy girl while she was hitchhiking on West Street in the City of Oneonta around six o'clock or a little after on December 9, that he had had a sexual encounter with her, that as they were coming back into town differences arose between them and she got all upset and jumped out of the car, that

she lay in the ditch semiconscious, that he got out of the car and put her in the back seat and told her that he was going to take her to the hospital, and that instead he drove over into Delaware County where he hit her in the throat three times with his fist, killing her. He added that he wanted to move the body to Hitt's logging site, and Hitt agreed to assist.

Hitt alerted the State Police and on January 1, 1978 informed them that defendant and he were going to move the body of Linda Velzy from the place where it was then located to a grave on Hitt's logging site on Winney Hill Road. On the basis of this information the police set up a stake-out to await the arrival of defendant and Hitt with the deceased girl's body. Shortly after 6:00 p.m. defendant and Hitt arrived at the logging site, and defendant was observed dragging the frozen body to a grave which had been prepared by use of a bulldozer furnished by Hitt. The police announced their presence and thereupon seized and arrested defendant. It was the testimony of some of the police witnesses that as he was being grappled to the ground he blurted out, "I am sorry; I am sorry. I killed her. I am no good. Please shoot me."

Defendant was taken to the State Police Station in Unadilla where he was given his constitutionally mandated preinterrogation warnings. He waived his right to counsel and made a full confession of his involvement in the disappearance and death of Linda Jill Velzy which was reduced to typewritten form and signed by him. Based entirely on Hitt's sworn testimony as to admissions made to him by defendant, the police obtained a warrant to search the car defendant had been driving on December 9. The search uncovered a contact lens, wood chips, cat and dog hairs,

blonde human hair and Christmas decoration "glitter squares".[1]

The January, 1978, Otsego County Grand Jury returned an indictment charging defendant with two counts of murder in the second degree. In count one t was alleged that defendant intentionally caused Linda Velzy's death by beating her about the head and neck with his fists (Penal Law, §125.25, subd 1), and in count two it was alleged that defendant, in circumstances evincing a depraved indifference to human life, recklessly created a grave risk of her death and caused her death by failing to transport her for medical care (Penal Law, §125.25, subd 2).

On pretrial motions by defendant, the trial court denied suppression of the blurted-out expression of guilt and remorse made by defendant when he was apprehended at the grave site, of the two detailed confessions (the oral admissions made to Arthur Hitt before defendant's arrest and the signed type-written confession made to the police after his arrest), and of the various items of physical evidence seized from defendant's car pursuant to the search warrant.

At trial, although none of the taped recordings of defendant's conversations with Hitt were offered in evidence, Hitt was himself permitted over objection to testify with respect to the statements made to him on December 31 in which defendant detailed his participation in the disappearance of Linda Velzy and the associated

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[1] At trial, the lens was matched to one missing from Miss Velzy's right eye, the wood chips were shown to be similar to a chip found in her pubic hair, the animal hair was proved consistent with hair found on the interior surfaces of her clothing, the human hair was established to be consistent with her own hair, and the glitter squares were seen to be the same as those found in the sheet in which her body was partially wrapped.

subsequent events. The prosecution was also permitted to introduce the items of physical evidence taken from defendant's car and his signed typewritten confession.

Defendant took the stand and testified that, by Hitt's own admission to him, it was Hitt rather than defendant who had had the sexual encounter and who had killed the Velzy girl, that Hitt supplied the car and drove it and also furnished the shovel, sheet and bulldozer for the reburial and that it was Hitt who took defendant to the site of the original placement of the body in Delaware County and then requested defendant's assistance in reburying the body.

At the conclusion of the trial the jury was instructed that it could find defendant guilty of either count or neither count but not both. After deliberation the jury acquitted defendant of intentional murder but convicted him of reckless murder.

On appeal, the Appellate Division rejected all but one of the several contentions advanced on defendant's behalf. As to that contention, each judge on the panel agreed that the signed typewritten confession had been obtained in violation of defendant's state constitutional right to counsel. Concluding, however, that the evidence of defendant's guilt was so overwhelming that the written confession was merely surplusage, the majority affirmed the conviction on a harmless error analysis. One justice dissented from this analysis.

Although we agree that only the denial of defendant's motion to suppress merits our discussion, we are compelled under settled principles of state constitutional law to conclude that violation by the police of defendant's right to counsel required suppression not only of the signed typewritten confession but also of testimony as to his earlier oral admissions made to Hitt, as well as of all

physical evidence seized from his car. Only the blurted-out expression at the grave site was admissible. Because the evidence which should have been suppressed constituted the very core of the People's case, it cannot be concluded that its admission was harmless. Accordingly, defendant's conviction must be reversed and the case remitted for further proceedings on the second count of the indictment.

We find no ground to disturb the denial of suppression of the police testimony as to the statement that defendant blurted out when he was arrested; both courts below have found that it was spontaneous (cf. *People v. Lanahan*, 55 NY2d 711).

For the purpose of determining whether the admissions made by defendant to Hitt should have been suppressed it must be concluded that at the time, December 31, Hitt was acting as an agent for the police pursuant to the arrangement for that purpose made in the County Judge's chambers on December 21. It was the State Police who directed and supervised Hitt in his role as their informer, and, of course, they were chargeable with knowledge of the direction given by defendant's attorney to the Oneonta Police that defendant was not to be questioned further in relation to the Velzy matter (cf. *People v. Garafolo*, 46 NY2d 592; *People v. Pinzon*, 44 NY2d 458). In employing Hitt as their agent to obtain incriminating statements from defendant who was represented by counsel, the police violated defendant's state constitutional right to counsel (cf. *People v. Rogers*, 48 NY2d 167). It follows that Hitt's testimony as to the incriminating statements made by defendant to him must be suppressed notwithstanding that defendant was not in police custody at the time the statements were made (*People v. Skinner*, 52 NY2d 24).[2]

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[2]In this case there is no room for a contention that the purpose of the police in their use of Hitt as an informer was to elicit evidence from defendant as to the commission of a subsequent, discrete criminal transaction (cf. *People v. Ferrara*, 54 NY2d 498; *People v. Middleton*, 54 NY2d 474). Defendant's incriminatory statements on

(Continued on following page)

By similar reasoning the physical evidence obtained pursuant to the search warrant issued on the basis of Hitt's testimony as to defendant's admissions to him must be suppressed (cf. *Wong Sun v. United States*, 371 US 471).

Finally, as all the justices at the Appellate Division agreed, defendant's signed typewritten statement made after his arrest while he was in police custody, at a time when to their knowledge he was represented by counsel who had directed the termination of all questioning, should have been suppressed.

It remains only to comment briefly on the views advanced in the dissent. Whatever may be said of a missing-person-emergency exception to the right of counsel rule—an issue as to which we decline to express any opinion—it suffices for the purposes of the present appeal to observe that there has been no address to any such theory by either the People or defendant in their briefs or on oral argument. Nor is there any suggestion that this contention was considered by County Court or at the Appellate Division, and neither court made any factual determination on which such an agreement could be predicated. Accordingly, it would be jurisprudentially both inappropriate and imprudent for us at this stage to base an affirmance of defendant's conviction on any such ground. If there is to

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(Footnote continued)

December 31 were unrelated to any new crime. The record discloses that they were elicited entirely independent of defendant's request for an alibi; defendant was relating the details of his past crime for a purpose independent of his request for an alibi. In any event any crime of hindering prosecution had been fully committed on December 12 when defendant made his request and when that request was repeated in taped conversations, apparently prior to December 21. There was no occasion for the continued use of Hitt with respect to any such crime. There can be no doubt that on December 31, Hitt was acting as police agent to obtain evidence as to defendant's participation in Linda Velzy's disappearance.

be an emergency exception in right to counsel cases, its recognition should be based on full development of an evidentiary record and come after the implications and ramifications of such an exception have been explored and considered with full participation of counsel, both at *nisi prius* and in the Appellate Division.

Moreover, even if the missing-person-emergency rule were to be recognized, its application in this or any other individual case would necessarily depend on a preliminary factual determination, and, as stated by Judge Meyer, the present record would not permit us, as a matter of law, to make the prerequisite factual determination that the police activities with respect to defendant after December 21, 1977 were in furtherance of any emergency search for a missing person. Although the police in a coordinated task force initially launched an extensive missing person investigation following Linda Velzy's disappearance on December 9, the evidence now before us is not so overwhelming as to compel the conclusion that the purpose of the December 21st conference in the County Judge's chambers and the use of Hitt by the police as their agent on December 31 was in furtherance of the search for Linda and not to obtain evidence of criminal activity on the part of defendant. The lapse of time as well as the other circumstances of the arrangement with Hitt disclosed in the record give rise to no inference that the police entertained an expectation of finding Linda Velzy alive.

Nor would it be proper, in our view, to send the case back for a new hearing, the introduction of new evidence and the possible development of a new theory on which to sustain the admission of the evidence which should, on the present record, have been suppressed (cf. *People v. Havelka*, 45 NY2d 636). There is no contention that, had they chosen to do so, the People could not have offered any evidence available to them to sustain such an emergency

exception at the original suppression hearing. That such a theory appears not to have occurred to anyone (until post-argument deliberation in our Court) provides no justification to grant "the People a second chance to succeed where once they had tried and failed" (*People v. Bryant,* 37 NY2d 208, 211).

For the reasons stated, the order of the Appellate Division should be reversed, defendant's conviction vacated, testimony as to his oral admissions to Hitt, his signed typewritten confession, and the physical evidence seized pursuant to the search warrant suppressed, and the case remitted to Otsego County Court for further proceedings on the second count in the indictment.

MEYER, J. (concurring in result):

Although I harbor no doubt that there is an emergency exception to the constitutional right to counsel and when next presented with the opportunity to do so will vote in favor of such an exception, no court has yet so held and the possibility that any court might, so far as the present record discloses, was never suggested at the December 21st hearing or to any of the three courts considering this case, or indeed until the conference of this Court after argument. I, therefore, cannot agree with my dissenting colleagues that defendant Knapp's conviction should simply be affirmed, for to do so would be to deny him the opportunity to which due process clearly entitled him to contest whether his statement of December 31st to Hitt, improperly obtained as it otherwise clearly was (*United States v. Henry,* 447 US 264, 274 and n 11; *Brewer v. Williams,* 430 US 387; *Messiah v. United States,* 377 US 201; see *Rhode Island v. Innis,* 446 US 291, 300 n 4), was obtained in a manner within that emergency exception. There *is* a point beyond which the fact that a person is missing may no

longer be reasonably viewed as constituting an emergency. To pose a *reductio ad absurdum,* the dissenters would not suggest that in a prosecution for the murder of Judge Crater, missing now these many decades, the introduction of a statement obtained under the same circumstances as was the statement obtained from Knapp could be justified on an emergency basis.

Whether an emergency exists is a question of fact, in which the fact that a person is missing is a highly important factor. It is not, however, the *only* relevant factor (compare Justice Blackmun dissenting in *Brewer v. Williams,* 430 US 387, 439, *supra,* with *State v. Beede,* 119 NH 620, cert den 445 US 967, reh den 446 US 993). To hold as a matter of law, as would the dissenters, that that fact alone justifies the deliberate, court-sponsored invasion of Knapp's right to counsel is to permit the exception to swallow the rule and to violate Knapp's right to due process in order to justify the violation of his right to counsel.

The evidence strongly suggests that Knapp is guilty of the murder of Linda Velzy. But I would rather see one guilty man go free than sanction in the interest of justifiably limiting the right to counsel an exception that will render the rule meaningless in many cases and which in this case cannot be reached without violating the due process clauses of the state and federal constitutions.

In my view the matter should be remitted for a further suppression hearing at which the facts concerning the basis on which the police acted could be presented by the state, upon which rests the burden of proof (cf. *People v. Hodges,* 44 NY2d 553, 557; *People v. Mitchell,* 39 NY2d 173, 180), and Knapp would be afforded the opportunity to which due process entitles him to contest those facts.*

*What is overlooked in footnote 4 of the dissent is that there can be no unfairness to the People in permitting Knapp to contest an issue which it was the People's burden to present.

Such a hearing would be permissible in view of the massive media coverage of Linda Velzy's disappearance which will provide a sufficient check on possible distortion (*People v. Havelka,* 45 NY2d 636, 644; *People v. Lypka,* 36 NY2d 210; *People v. Horowitz,* 21 NY2d 55).

JASEN, J. (dissenting):

Although I did not acquiesce in prior holdings of this court adopting the broad right of counsel rule (*People v. Rogers,* 48 NY2d 167, 175-178; *People v. Marrero,* 51 NY2d 56, 59-61; *People v. Skinner,* 52 NY2d 24, 32-36; *People v. Bartolomeo,* 53 NY2d 225, 236), which would seem to necessitate a reversal of defendant's conviction of reckless murder, in spite of overwhelming evidence of guilt, I believe that there comes a point at which an appellate court, such as ours, must recognize that the dictates of common sense and reason must be considered in striking a balance between a suspect's fundamental right to counsel and the fundamental duty of the police to aid persons in trouble, particularly those who may be the victims of violent crimes. A rule that turns criminals free can be justified only by clear and convincing evidence that its benefit to society outweighs its cost to society. In my view, the benefits from applying an inflexible per se right of counsel rule to the particular facts and circumstances surrounding this case falls far short of meeting that test.

In my opinion, the analysis presented by Judge Wachtler in his dissenting opinion, whether viewed as an emergency exception[1] to the right of counsel rule or as a

[1]I see no reason to require a hearing on the question of whether or not an emergency existed. In my view, an emergency existed by virtue of the missing persons investigation. Thus, the scope of right to counsel in light of the emergency nature of the investigation can be addressed by this court even though it was not considered by the courts below. The very nature of a missing persons investigation, combined with the facts as found by the courts below, clearly constitutes an emergency situation.

limitation on the further development of that right as it relates to an emergency police inquiry, recognizes the practical realities of a missing persons investigation and the inappropriateness of further applying the per se right of counsel rule enunciated in *People v. Skinner (supra)*. Such an investigation by its very nature requires the police to act expediently in the hope of finding a person whose life may be in danger and who may be in need of immediate assistance. While it may be true that the person is missing because of the criminal acts of another, the rights of a potential defendant should not hamper an investigation directed primarily to aid the victim. (*Snyder v. Massachusetts*, 291 US 97, 122.)

Nor is it practical to suggest that the police should know the precise moment their investigation changes from primarily a missing persons investigation to an accusatory investigation. In fact, many such emergency investigations will in the natural course of good police work uncover criminal activity and evidence related to that activity. In recognizing a demarcation between investigatory and accusatory police work, for the purpose of applying the right to counsel rule, we would be fulfilling our obligation to locate the proper balance between competing demands for effective police protection and strict observation of a suspect's fundamental constitutional rights. However, as a policy matter, we should allow the police adequate discretion to conduct this type of emergency investigation until it is clearly established that a crime has been committed, at which point the investigation would be termed accusatory in nature and would focus only on determining responsibility for the crime.

In the insulated environment of an appellate court, which naturally deals in hindsight, it is easy to pinpoint when such a change in an investigation occurred, but I do

not believe that the Constitution requires the police to make such fine distinctions during an emergency investigation oriented to locating a missing 18-year-old college student. (*People v. Rogers, supra; People v. Skinner, supra; People v. Middleton,* 54 NY2d 474; *Hoffa v. United States,* 385 US 293, 310.) To do otherwise would result in the accused going free, not because the constable blundered, but because the constable lacked the foresight to ascertain the precise nature of the investigation.

It is for this reason that I believe this case is distinguishable from the prior precedents of this court which extended the constitutional right to counsel to the investigatory stages of police work. In *People v. Skinner* (52 NY2d 24), it was ascertained that a murder had been committed and finding the person responsible was the focus of the police investigation. There were no competing concerns regarding the victim's safety or fate. Nor was there any compelling time constraint such as exists when it is thought that a person may be being held captive. Thus, I believe there is a very real practical distinction to be drawn between a disappearance investigation and the situation where the police know the precise nature of the crime and are conducting an investigation to establish a person's involvement in that already ascertained crime. I welcome the opportunity to join my dissenting colleagues in recognizing the compelling nature of those practicalities which makes this case distinguishable from prior precedents of this court. (*People v. Rogers, supra; People v. Skinner, supra.)*

To hold otherwise would constitute yet another expansion of a person's right to counsel in a non-custodial setting during the course of an investigation. In my view, this would be an unwarranted expansion of the right to counsel which, once again, would elevate the rights of the potential defendant above the compelling interests of the State.

(*People v. Rogers, supra.*) Furthermore, it may well have the dangerous effect of barring the police not only from investigating a crime, but also from aiding a citizen who is the victim of criminal activity.

For all of these reasons, I would affirm the order of the Appellate Division.

People v Knapp
Case #390

WACHTLER, J. (dissenting):

The police should not be prohibited from using an informant to obtain information from a person represented by counsel when the police are trying to find and possibly rescue a missing person. The rule precluding the police from questioning a person represented by counsel in order to solve a crime known to have been committed, or to gather evidence for conviction of such a crime, had not been applied, and should not be extended to hinder police officers actively engaged in attempting to provide emergency assistance to those who are or may be in danger. When a person has been reported missing under unusual circumstances the police may reasonably proceed on the assumption that the person may be in danger or in need of police assistance. It should not be for the courts to say that at a certain point, to be revealed after the event, intensive rescue efforts should cease because the police should, as a matter of law, abandon all hope of finding the missing person alive.

In this case the defendant murdered Linda Velzy, an 18 years old college student, while he was released on bail awaiting trial on an indictment charging him with sodomy and unlawful imprisonment of another young woman. He admitted his guilt on three separate occasions: first, to an erstwhile friend, Arthur Hitt, who was assisting the police

in locating the missing student; second, at the time of his arrest while attempting to dispose of his victim's body; and third, at the police station shortly after his arrest. Additional evidence of his guilt was discovered in his car pursuant to a warrant based entirely on the defendant's conversations with Hitt. The defendant made a pretrial motion to suppress the evidence claiming some unspecified violation of his constitutional rights. The trial court denied the motion and the jury found the defendant guilty of murder.

The Appellate Division held that the defendant's third confession at the station house should have been suppressed, but found the error harmless in light of the other evidence of guilt and thus affirmed the conviction.

On appeal to this court the defendant urges that all of this evidence, except the dead student's body, should be suppressed. He argues that the police should not have approached him or accepted the aid of his confidant, Arthur Hitt, to determine what if anything the defendant knew of Miss Velzy's disappearance because the police knew that the defendant had recently been indicted for abducting and sexually molesting another young woman in the area, and therefore knew that on that pending charge he had an attorney, who in fact had, at the defendant's request, directed the police to discontinue their efforts to obtain information from the defendant concerning the missing person. It is contended by the defendant, and the majority, that our prior cases construing the State constitutional right to counsel mandate suppression of the evidence under these circumstances.

In my view the Appellate Division was correct and the conviction should be affirmed. A careful reading of the facts and applicable law shows that the defendant's argument calls for an extension and, in my view, an unwarranted extension of the right to counsel into an area in

which it has never been held to apply, and should not be held to be applicable.

The most important fact in the case is that Linda Velzy disappeared on December 9, 1977 and was not found until January 1, 1978 When informed of her mysterious disappearance on December 10 the Oneonta police opened a "file 5" which, it was noted at the hearing, is the official designation for a missing person's investigation. They also enlisted the aid of the State police and the campus security force and established a special command post to coordinate their efforts to find Miss Velzy.

The search continued throughout December. Large numbers of police officers searched the surrounding woods, helicopters were employed, as well as bloodhounds, and apparently even spiritualists. The police also interviewed over a hundred people including the defendant. Thus accepting Hitt's offer to determine what, if anything, the defendant might know about Miss Velzy's disappearance and present whereabouts was just one of the many leads pursued by the police.

All of the defendant's statements to Hitt were made during this first stage of the investigation, while the police were attempting to locate and possibly rescue a missing person. The only statements the police obtained from the defendant after it was determined that a crime had been committed in connection with the young woman's disappearance were the second and third confessions.

Although the police naturally considered it possible that she might be dead, they had no evidence supporting that theory until the day before the defendant's arrest when the defendant informed Hitt that he had killed her. The corpus delicti of the crime was not established until January 1, 1978 when the defendant was arrested dragging her body to a newly dug grave. Prior to that time the police did not know whether she was dead or alive, sick or well,

voluntarily absent or criminally abducted and thus were conducting a missing person's investigation, not a homicide case.

A missing person's investigation is not a criminal investigation, as the majority opinion assumes. This is not just a semantic difference. It is a constitutionally recognized distinction (see e.g., *People v. Mitchell,* 39 NY2d 172), and a point of the utmost significance in this case.

The primary function of the police is to protect the public by preventing crime and rendering emergency assistance to those whose lives or safety may be in jeopardy. After a crime has been committed the police assume their secondary role of determining who is responsible and gathering evidence for prosecution.

The State constitutional rule prohibiting the police from questioning a person represented by counsel in the absence of counsel, limits the investigative techniques available to the police (see e.g., *People v. Middleton,* 54 NY2d 474). In some cases this merely delays the investigation, in others it may completely frustrate it. Thus far this type of restriction has been imposed on the police only in cases where they are investigating a crime known to have been committed in order to solve the crime or obtain evidence which would insure a conviction (see e.g., *People v. Hobson,* 39 NY2d 479 [robberty reported]; *People v. Settles,* 46 NY2d 154 [police officer killed]; *People v. Singer,* 44 NY2d 241 [young woman found murdered]; *People v. Garafolo,* 46 NY2d 241 [young woman found murdered]; *People v. Rogers,* 48 NY2d 167 [robbery reported]). Significantly, in *People v. Skinner* (52 NY2d 24), which the majority believes to be dispositive in this case, the police found the victim's dead body on June 25, 1975 and obtained the damaging admissions from the defendant on March 10, 1977 nearly two years later. Thus that was also a case in

which the victim had been found and any information the police might obtain from the defendant could only serve to aid them in their secondary role of establishing criminal responsibility for a crime known to have been committed some time ago.

In short, the critical distinguishing factor between our prior cases and the one now before us is this: In none of our prior cases was there any possibility that the life or safety of an innocent third party, perhaps in imminent danger, might depend upon the success of the police investigation. Limiting the power of the police to investigate a crime known to have been completed, by precluding them from obtaining information from a person who has retained an attorney, may result in the guilty party going free. Imposing the same restrictions on the police when they are attempting to rescue a person potentially in danger may, and in many cases undoubtedly will, have the added consequence of contributing to the death or injury of the victim.

Well founded judicial reluctance to interfere with the emergency functions of the police has served as the basis for recognizing limitations on other constitutional rights.

Thus, for instance, the *Miranda* rule does not require the police to pause and advise an individual of his rights when the officers are merely investigating a suspicious and possibly criminal inciden but have not yet determined whether there has been a "definite" and "conc luded" crime (*People v. Huffman*, 41 NY2d 29; *People v. Greer*, 42 NY2d 170). The "emergency doctrine" applied in Fourth Amendment cases is the most well developed example. It was adopted by this court in *People v. Mitchell* (39 NY2d 172) where the police had conducted a "room-by-room" search of a hotel to locate a missing maid, who was eventually found dead in the defendant's room. The police concededly had no warrant and no probable cause

to believe the defendant had committed a crime. However, we noted (at p 178) that the "maid's disappearance was a mystery and it was not known whether she had been stricken with some illness, suffered an accident or possibly fallen victim to a crime. Each of these three alternatives was possible." In upholding the police officers' actions we held that the police have the right to enter and investigate in an emergency inherent in the nature of their duties as peace officers and noted (at p 180) that " '. . .[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would greatly endanger their lives or the lives of others' (*Warden v. Hayden,* 387 US 294, 298-299)."

Recognizing that the police should not be bound by the unusual restrictions imposed by this State's constitutional right to counsel when they are conducting a missing person's investigation is consistent with constitutional principles generally and is justified by the demands of that type of investigation. The need to make wide ranging inquiries is no less important than the need to make sweeping search when the police are attemping to locate a missing person. Delay or frustration of the investigation can be equally fatal for the missing person whether it is occasioned by unrealistic restrictions on the right to search or on the right to inquire. Indeed, the broadened power of the police to search for a missing person is of little value if the authorities do not have the corresponding power to obtain leads by making inquiry of all segments of the community. When a person has disappeared under unusual circumstances, law abiding citizens or those without attorneys are not the only ones, or even the most likely, to have useful information.

As is the case with other constitutional rights, there are limits to the rule prohibiting the police from obtaining statements from a person who has retained or requested

the assistance of counsel (*People v. Middleton*, 54 NY2d 474; *People v. Ferrara*, 54 NY2d 498). In the *Middleton* case where the defendant, arrested for a traffic infraction, offered the arresting officer a $10,000 bribe after invoking the right to counsel, we concluded that further inquiry by the police as to the reason for the bribe was not prohibited, noting that a contrary holding would "unrealistically * * * limit investigatory procedures relating to bribe offers". It is even more unrealistic, if not completely irresponsible, to require police officers attempting to locate a missing person, potentially in danger, to abandon a promising lead simply because it would require the use of an informer to obtain information from a person represented by counsel.[1]

The case now before us is an appropriate one to recognize that a defendant cannot employ the right to counsel to frustrate or delay police officers searching for a

[1]Contrary to the majority's holding, the principle recognized in the *Middleton* and *Ferrara* cases provides an additional basis for admitting the defendant's conversations with Hitt. When the defendant requested Hitt to give false information to the police he committed the crime of Criminal Solicitation (see Penal Law §100.00-100.15), because he was asking Hitt to commit the crime of Hindering the Prosecution (Penal Law §205.50-205.65), known at common law as an accomplice after the fact (LaFave & Scott, Criminal Law §66 p 523). Statements made in furtherance of a criminal act are not the type of statements entitled to protection under the State Constitution (*People v. Middleton, supra; People v. Ferrara, supra*).

Although as the majority notes this new crime was complete when the defendant made the request, it does not follow that there was no need for the police to utilize Hitt to further investigate the matter. This argument overlooks the fact that *evidence* of the crime would not be complete until it could be shown that some earlier crime had been committed which the defendant was attempting to cover up (see Penal Law §205.50-205.65; §100.00-100.15). Nor is it realistic to focus on the intent of the police in such an investigation. A police officer investigating to determine whether a defendant's request for a false alibi is an attempt to cover up some earlier crime, cannot do so without also intending to uncover the earlier crime.

missing person. Although we now know, as the defendant did from the beginning, that the missing student had been killed or fatally injured on December 9, this was not known by the police on December 21 when they formally accepted Hitt's offer to attempt to learn if the defendant knew anything about her disappearance. All the authorities knew at that point was that, when last seen, Miss Velzy had indicated that she would probably walk or hitchhike back to the campus; that the defendant had recently been arrested for abducting and sexually assaulting another hitchhiking co-ed and that he had asked his friend Hitt for a false alibi for the evening of December 9. This, of course, was a lead worth following but it obviously did not provide solid proof or even probable cause to believe that the defendant was responsible for Miss Velzy's disappearance or that she was dead. Missing persons, even those who have been abducted, are often found alive long after their disappearance, as we know from the Patti Hearst case, and others of lesser notoriety.[2] The defendant's attempt to obtain an alibi for the night of the disappearance was nothing more than a suspicious circumstance. But even if the police had firmer grounds to suspect him, his involvement in Miss Velzy's disappearance would not necessarily establish a homicide or rule out other possibilities. Significantly the pending indictment charged the defendant with sodomy and unlawful imprisonment, suggesting that at some point the girl that he had abducted in that case must have been released alive. We do not know how much time elapsed in that case but it is interesting to note that on the trip to Binghamton the defendant had informed Hitt that "he wanted to pick

[2]The example chosen by Judge Meyer in his concurring opinion is not apt or helpful. In this case we are concerned with a potential victim missing approximately 20 days, and not with an historical curiosity which occurred over 50 years ago.

up another girl and take her off in a cabin or something back in the woods out of the way and keep her there for a couple of weeks and then just do away with her."

The record is not deficient, nor is there any need to remit for additional findings, simply because it does not reveal the subjective intent of the officers involved in the investigation or has lead some to speculate that they were only intent on obtaining evidence against the defendant.[1] With three police forces and so many individuals actively involved in the search over several weeks, it is unlikely that we will find unanimity or any persistently held beliefs. With the limited information available to the police any individual belief would be little more than a hunch. The only practical approach for the courts is to recognize that when a person has disappeared under mysterious circumstances, the police may reasonably proceed on the assumption that he or she may be in danger or in need of police assistance. It does not matter whether all, most, or only some, of the officers assigned to the investigation are fully committed to that belief, whether their supervisors share it, or whether a judge asked to assist in the case entertains

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[1]The subjective intent of police officers is relevant in Fourth Amendment cases where the emergency doctrine is employed to physically intrude upon the defendant's person or property, without a warrrant, and, indeed without probable cause (see e.g., *People v. Michell*, 39 NY2d 172). It has not been considered relevant in cases involving emergencies where the police conduct is less intrusive. For instance, when the police merely converse with the defendant in order to determine the nature of suspicious, possibly dangerous and presumably criminal activity, the police officer's "primary purpose" in making the inquiry has played no part in determining whether it was proper to dispense with *Miranda* warnings (see e.g., *People v. Huffman*, 41 NY2d 29; *People v. Greer*, 42 NY2d 170). The same rule should apply in this case where the police were merely attempting to determine, by conversations with the defendant and through their agent Hitt, whether the defendant possessed information concerning Miss Velzy's mysterious disappearance.

the belief. Until the person has been found, or conclusive evidence of death has been presented there is no reason for the police to abandon all hope of rescue. Neither should the courts say with hindsight, that the police should have conducted the investigation as if no hope remained. Thus the record as it stands is sufficient and supports our view that the emergency doctrine is applicable to this case.[4]

The issue presented by the facts in this case cannot be ignored or avoided because of any perceived failure on the part of the People to urge that we adopt an emergency exception to the State constitutional right to counsel. Strict requirements with respect to the sufficiency of the record

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[4]The view expressed in Judge Meyer's concurring opinion, that it would be unfair to the defendant to recognize the emergency limitation on his rights at this stage is, at least, ironic. First, it should be emphasized that the defendant never submitted any facts in support of his motion to suppress. He simply claimed, without elaboration, that his statements should be suppressed because they "were involuntary and otherwise obtained in violation of the defendant's rights under the United States Constitution and otherwise". Thus he presented no factual basis for suppression or factual issues entitling him to a hearing and was only afforded a hearing because the People consented to grant him one. Secondly, at the suppression hearing which extends through two volumes of the record, the defendant made no legal argument whatsoever in support of his conclusory contention that his rights had been violated, made no attempt to identify for the court or disclose to his adversary the legal basis for the relief he sought, and therefore never afforded the People an opportunity to respond at the hearing to the arguments he has presented on this appeal. As a general rule the defendant's failure to present the issue in the trial court would preclude the defendant from raising it on this appeal. However, once again, the defendant has been granted a special dispensation because the right to counsel issue happens to be one of those rare points that need not be preserved.

In short, the defendant has been afforded more of a hearing, both in this court an the trial court, than he would be generally entitled to under the law. The only unfairness is to the People because the conviction is being set aside for their "failure" to respond to an argument the defendant never made.

and appellate arguments of counsel have not previously deterred us from reaching the merits when the State's constitutional right to counsel is involved.[5] In any event the defendant's contention that his right has been violated necessarily involves consideration of the scope and limits of the right. A defendant's constitutional rights cannot be extended by default. If the People had completely neglected to submit a brief, or had been precluded for failure to present a timely brief (22 NYCRR 500.7[b][2]), we would not be bound to accept the defendant's arguments simply because they were unopposed.[6] Indeed even if the People had expressly conceded the defendant's point, that would not "relieve us from the performance of our judicial function . . . [or] require us to adopt the proposal urged upon us" (*People v. Berrios*, 28 NY2d 361,

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[5]When the record shows that this right has been violated we have consistently granted relief even though the defendant has failed to properly preserve the issue in the trial court (see e.g., *People v. Samuels*, 49 NY2d 218, 225; *People v. Charleston*, 54 NY2d 662) or has neglected to argue the point on appeal (*People v. Carmine A.*, 53 NY2d 816). Similarly, we should deny relief if the record shows that there has been no violation even though the People may not perceive that the defendant's arguments would extend the right into areas where it would not be applicable.

[6]Despite the fact that I write in dissent for three judges, including myself, it is plain from Judge Meyer's concurring opinion that at least four judges of this court are now prepared to recognize the emergency doctrine in principle.

* * *

Order reversed, conviction vacated, testimony as to defendant's oral admission to Hitt, defendant's signed typewritten confession, and the physical evidence seized pursuant to the search warrant suppressed, and case remitted to Otsego County Court for further proceedings on the second count of the indictment. Opinion by Judge Jones in which Chief Judge Cooke and Judge Fuchsberg concur. Judge Meyers concurs in result in a separate opinion. Judge Jasen dissents and votes to affirm in an opinion. Judge Wachtler dissents and votes to affirm in an opinion in which Judge Gabrielli concurs.

Decided October 12, 1982

366-367; see also *People v. Lewis*, 26 NY2d 547, 550; *People v. McGowen*, 42 NY2d 905, 907; *Sibron v. New York*, 392 US 40, 58; *Young v. United States*, 315 US 257, 258).

In sum, when the police are investigating a report that a person has disappeared under mysterious circumstances, and has not yet been found, the State constitutional right to counsel should not prohibit the police from approaching any member of the community who may have useful information, including those who have a record of prior convictions or pending charges or who have retained counsel to immunize themselves from police inquiries. A missing person's investigation is not a homicide case when no body has been found and there was no reason why the police in this case should have been bound to conduct the investigation as if Miss Velzy's life or safety did not depend upon the success of their efforts.

The defendant's conviction should be affirmed.

APPENDIX B.

Appellate Division Opinion.

June 18, 1981 33054

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

RICKY A. KNAPP,

Appellant.

Appeal from a judgment of the County Court of Otsego County (Mogavero, Jr., J.), rendered July 3, 1978, upon a verdict convicting defendant of the crime of murder in the second degree.

Linda Velzy, a student attending the State University College at Oneonta, was last seen alive on December 9, 1977. An intensive investigation to discover her whereabouts was undertaken by the City of Oneonta Police Department in conjunction with the New York State Police and the campus security police.

Acting on information furnished them by an informant, the authorities apprehended defendant Knapp on January 1, 1978 while he was attempting to drag the young woman's frozen body from the trunk of a car to a previously excavated gravesite. While being grappled to

the ground, he allegedly cried out, "I am sorry, I am sorry. I killed her. I am no good. Please shoot me."

Of the many issues defendant raises, only one, the trial court's denial of his motion to suppress a three-page typewritten confession, warrants comment. That statement was made in the absence of counsel at a time when the police were aware that defendant had retained an attorney with respect to pending unrelated sodomy and unlawful imprisonment charges lodged against him and after a city police detective had been advised by the attorney not to question Knapp regarding Miss Velzy's disappearance. As indicated by the case law in this area, developed since the trial herein was completed, the confession should have been suppressed (*People v. Albro*, ____ NY 2d ____ [May 5, 1981]; *People v. Kazmarick*, 52 NY 2d 322; *People v. Bell*, 50 NY 2d 869; *People v. Rogers*, 48 NY 2d 167). Here, however, the evidence of defendant's guilt was so overwhelming that the written confession was merely surplusage. A reading of the records leads to but one conclusion: there is no reasonable possibility that admission of this confession contributed to defendant's conviction. Since we view its admission as harmless error (see *People v. Almestica*, 42 NY 2d 222), the judgment is affirmed.

Judgment affirmed.

Sweeney, J.P., Main, Yesawich, Jr. and Herlihy, JJ., concur; Mikoll, J. dissents and votes to reverse in the following memorandum.

MIKOLL, J. (dissenting).

I respectfully dissent.

I agree with the majority that the confession should have been suppressed. However, I cannot agree with the

majority's conclusion that "there is no reasonable possibility that admission of this confession contributed to defendant's conviction" and that its admission was "harmless error" (see *People v. Almestica*, 42 NY 2d 222). I, therefore, am compelled to vote to reverse and order a new trial.

The trial court charged the jury that to find the defendant guilty of murder in the second degree they, *inter alia*, "have got to find that the deceased, Linda Jill Velzy, was alive at the time mentioned in the second count of the indictment and that medical facilities were available within a reasonable time to be of any assistance to her". As the prosecutor stresses in the People's brief submitted on this appeal, defendant's statement furnished that significant proof. The statement in question indicates that after the girl's exit from the vehicle, defendant stopped and found her "moaning" and "semi-conscious". He states that he put her in his car and that "all I could think of was getting her to a hospital". The prosecutor in his summation also mentioned to the jury that in his signed confession defendant stated that he "put her in the car moaning and unconscious in the back seat and was first going to take her to the hospital". In my view, this evidence was essential to the prosecution's case and for that reason I am unable to agree with the majority that there is no reasonable possibility its admission did not contribute to defendant's conviction (*People v. Crimmins*, 36 NY 2d 230, 237).

The judgment should be reversed, the confession suppressed and a new trial ordered.

APPENDIX C.

Court of Appeals Decision on Reargument Motion.

3 Mo. No. 1218

THE PEOPLE &c.,

Respondent,

vs.

RICKY A. KNAPP,

Appellant.

Motion for reargument denied.

Decision Court of Appeals Dec 14 1982

Received Dec 16 1982

No. 82-1434

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

RICKY A. KNAPP,
Respondent.

Brief in Response to Petition for a Writ of Certiorari to the New York State Court of Appeals

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Questions Presented.

1. Whether the suppression of respondent's alleged complete oral and written confessions, the testimony of a police agent, and a massive amount of physical evidence, all upon the ground of violation of respondent's New York State constitutional right to counsel, leave the prosecution's case with evidence far less than overwhelming.

2. Whether the alleged admissions of respondent to a police agent who had interrogated respondent as an alter ego of the police in violation of the respondent's New York State constitutional right to counsel provided a legitimate basis for the issuance of a search warrant. If not, is the search warrant otherwise defective in basis and/or such that the evidence allegedly seized pursuant thereto should in any event have been suppressed?

3. Whether the decision of the New York State Court of Appeals, specifically limited to interpretation of the right to counsel, search and seizure and related New York State exclusionary rules, is a proper vehicle for this Court to review the Federal exclusionary rules.

Table of Contents.

TABLE OF AUTHORITIES.

CASES:

Page

STATUTES CITED:

No. 82-1434

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

RICKY A. KNAPP,

Respondent.

Brief in Behalf of Respondent Ricky A. Knapp in Opposition to Petition for a Writ of Certiorari to the New York State Court of Appeals.

Respondent, Ricky A. Knapp, submits this brief in opposition to the petition for a writ of certiorari seeking to review the determination of the New York State Court of Appeals in the instant case decided October 12, 1982 (57 NY2d 161).

Opinion Below.

In petitioner's description of the opinion below (petition, p. 6), the disposition of the New York State Court of

Appeals is misdescribed. As petitioner would have it, the Court of Appeals reversed and granted a "new trial." The opinion of the Court of Appeals (57 NY2d 161, 176) states specifically that ". . . case remitted to Otsego County Court for *further proceedings* on the Second Count in the Indictment." (Emphasis supplied.)

The distinction is significant in that the actual disposition of the Court of Appeals cannot be interpreted as concluding that there was sufficient evidence for a new trial, no less overwhelming evidence, but rather the Court of Appeals left to the Court of original jurisdiction the question of whether there was even sufficient remaining evidence to sustain a *prima facie* case in connection with any proposed new trial. This issue will be developed more fully at a later section of this brief dealing with the evidence that the petitioner claims remains available to petitioner in connection with any further proceedings.

Petitioner also interprets the decision of the Court of Appeals (petition, p. 7) as holding that the police agent ". . . had entered the investigation . . . ."

It is submitted that this is not a correct interpretation of the Court of Appeals decision and that the record demonstrates that the police, from the beginning, never considered the matter of the missing girl anything but a homicide investigation and, as specifically found by the Court of Appeals, at least by the time the police agent was set to work by the police, the matter was not only adversary in nature but the police were specifically out "to get Knapp" (57 NY2d 161, 170).

Jurisdiction.

It is also respectfully submitted that this Court also lacks jurisdiction in this matter in that there is present on this record no federal question nor any question of federal law but rather a state court's (in this instance, the New York State Court of Appeals) interpretation of the right to counsel rule, the exclusionary rule and related matters strictly upon the basis of the New York State Constitution. Merely because respondent, in the Courts below (including the Court of Appeals), had presented to those Courts, for persuasive value, reasoning and so forth, decisions of this Court and other Federal Courts, does not create a federal question nor render this matter a question of federal law where the Court of Appeals has specifically stated that its decision was made ". . . under settled principles of *State constitutional Law* . . ." (57 NY2d 161, 173). (Emphasis supplied.)

Statement of the Case.

On the evening of December 9, 1977, Linda Jill Velzy, an eighteen-year-old female student at the New York State University at Oneonta, New York, disappeared. Her disappearance was initially reported to campus security police, who notified the Oneonta Police Department. Eventually, these agencies, in addition to the New York State Police, conducted a joint investigation into the disappearance.

Information available from friends and family of Miss Velzy clearly indicated that foul play was involved in her disappearance.

An intensive search was begun and carried out as a "missing person" investigation (even though the police

later conceded that it had been a *homicide* investigation from the outset). A search was made of the surrounding countryside which included the use of helicopters and bloodhounds. The police questioned over one hundred people, including respondent.

When questioned, on December 12, 1977, respondent informed the investigating officers, Detective Angellotti and Investigator Dabreau, of his whereabouts on December 9th and denied any knowledge concerning the Velzy disappearance. During the course of this conversation, at the request of the officers, respondent agreed to submit to a polygraph examination. The police thereafter from time to time continued to question respondent and communicate with his family.

Throughout the investigation, respondent was under felony indictment in connection with a previous matter and had retained the services of attorney John H. Owen of Cooperstown, New York. The previous matter remained pending through the Velzy investigation.

As a consequence of the request that respondent take a polygraph examination, respondent contacted Owen, who advised him to not submit to the test. The police continued questioning respondent on several occasions, until on December 15 or 16, Owen telephoned Detective Angellotti, and informed him that he (Owen) had advised his client not to take the polygraph test, and directed the police to either arrest respondent or cease their harassing questioning of him.

Although *direct* attempts to question respondent ended in compliance with Owen's demand and were not resumed until after respondent's subsequent arrest (January 1,

1978), later in December, 1977, members of the consolidated investigating team arranged to question respondent *indirectly* through an agent, one Arthur Hitt.

Hitt, the owner of a logging site where respondent occasionally worked, was then under indictment for various felony offenses. When the police first attempted to question Hitt, he refused to talk with them without his attorney being present. Eventually, on December 15 or 16, Investigator Dabreau called attorney Terence P. O'Leary (Hitt's attorney) and asked O'Leary whether Hitt was going to cooperate with the police in the Velzy matter. O'Leary responded that, under certain conditions, Hitt would cooperate.

Obviously, sometime between the time the police first attempted to question Hitt and the time when Investigator Dabreau called O'Leary, Hitt had conferred with O'Leary and told O'Leary that respondent had requested of him, on December 12, some sort of alibi for the evening of December 9th; this alleged alibi request supposedly led Hitt to believe that Knapp was responsible for a crime involving the Velzy girl.

In connection with Hitt and his allegations, on December 21, 1977, a conference was held in the Chambers of the Otsego County Judge, Hon. Joseph A. Mogavero, Jr. At this conference, Judge Mogavero offered official consideration and motivation to Hitt to assist the police agencies in the investigation of respondent with rewards to follow in the event of the arrest of respondent. As noted, Hitt had retained his own attorney, and this attorney (O'Leary) interpreted the mission as assigned to Hitt in the Judge's chambers as being one "to get Knapp."

During the next ten days, Hitt made several telephone calls to respondent which were recorded by State Police investigators. In the same period, the State Police also outfitted Hitt with recording equipment for several face-to-face meetings with respondent. Hitt was guided by members of the State Police as to how he should question respondent.

By pre-arrangement, Hitt was to tell respondent he (Hitt) did not believe respondent had hid the body well enough and propose that they re-bury it on the Hitt logging site. Allegedly, this prompted respondent to allegedly admit to Hitt, in an unrecorded conversation, on December 31, 1977, that he had killed the Velzy girl. In any case, it was decided to re-bury the body the next day on the Hitt logging site.

Hitt related this alleged information to the State Police, for whom he was working, and a stakeout was set up at the Hitt logging site on January 1, 1978.

Shortly after 6:00 P.M. Hitt and respondent arrived at the logging site with the body in the trunk of Hitt's automobile. Moments later respondent was observed dragging a frozen body to a grave which had been prepared by Hitt with his bulldozer, whereupon the State Police then and there arrested him.

At the trial, certain officers testified that respondent made certain exclamations indicating that he was guilty of the murder of the girl, while other State Police officers in the same area would testify that they heard no such exclamations.

Respondent was not taken to the Command Post in the Municipal Building in Oneonta, nor to the nearby State

Police Barracks, but instead was taken by Investigators McElligott and Allen all the way to the State Police Headquarters at Sidney, New York, a distance of nearly forty miles.

McElligott and Allen later claimed that they there obtained a voluntary, three-page written confession.

Meanwhile, Hitt was presented to a local magistrate and gave testimony under oath in support of an application for a search warrant as to defendant's automobile. The warrant was issued and resulted in the introduction at the trial of massive amounts of physical evidence, mostly over defense objection, most of which objections went beyond the claimed invalidity of the warrant.

The Otsego County Grand Jury returned a two-count Indictment charging defendant with both intentional murder (Penal Law, 125.25, subd. 1) and reckless murder (Penal Law, 125.25, subd. 2).

The jury acquitted respondent of intentional murder but convicted him of reckless murder.

The defendant appealed to the Appellate Division of the New York State Supreme Court, Third Judicial Department, which Court erroneously affirmed the judgment of conviction (Mikoll, J., dissenting). The basic errors of the Appellate Division consisted of failing to hold that, in addition to the written confession, all alleged admissions obtained by the police agent, Arthur Hitt, and all physical evidence obtained pursuant to the search warrant should have also been suppressed; and error in holding that, at least following a proper suppression ruling, the remaining evidence was not overwhelming such that the errors made

by the County Court (and the Appellate Division), as to suppression, were not harmless errors. Leave to appeal to the Court of Appeals was granted and it reversed and remitted for further proceedings, finding that all admissions allegedly obtained, at least those obtained after Owen's telephone call to Detective Angellotti on December 15 or 16, should be suppressed, as well as the fruits thereof (specifically identifying them to conclude all of the physical evidence seized pursuant to the search warrant based upon the unlawfully garnered admissions). Rather than find the remaining evidence to be overwhelming and the failure to so suppress being harmless error, the Court of Appeals found that evidence excised from the prosecution's case constituted the very core thereof. A motion for reargument was denied by order dated December 14, 1982.

Reasons for Denying the Writ.

A. The suppressed evidence constitutes the very core of the prosecution's case such that there remains not only no overwhelming evidence but evidence insufficient to support a prima facie case at any new trial.

Petitioner begins his argument by insisting that there remains, following suppression, sufficient overwhelming evidence in support of conviction. In doing so, he misstates the suppression directed by the Court of Appeals in that he speaks of suppression only in terms of oral and written alleged confessions, overlooking the suppression of a massive amount of physical evidence seized from respondent's automobile pursuant to the warrant.

In particular, the Court of Appeals directed suppression of any and all admissions allegedly obtained (at least after Owen's telephone call to the Police on December 15 or 16,

1977) by the police agent or by the police themselves and, because the search warrant was based upon the improperly obtained admissions allegedly obtained by the police agent, the materials seized under the warrant was also suppressed as fruits of the poisonous tree.

Turning now to petitioner's effort to marshal remaining evidence in support of a *prima facie* case at any new trial in this matter, the following should be noted:

(1) As to the respondent's possession of the frozen body on January 1, 1978 (erroneously stated as January 1, 1981, at p. 16 of the petition), the corpse as well as respondent's presence at the grave site is included in the suppression by the Court of Appeals in that the location of the body, arrangements for its transfer and respondent's presence at the reburial site are each, according to the prosecution's version of the case, products of incriminating admissions allegedly obtained by the police agent, Arthur Hitt.

(2) As to the alleged spontaneous declarations allegedly made by respondent at the time he was pounced upon, knocked down, threatened with a weapon and seized by the police at the time of the arrest at the gravesite, it should be noted, in the first place, that these admissions go almost totally to that count of the subject indictment charging intentional murder, of which respondent has already been acquitted. In the second place, these alleged spontaneous admissions (which were discredited by the jury at the trial already held) will presumably be discredited by the jury at any forthcoming trial for the reason that there is no explanation for the situation where certain police officers allegedly heard (different versions) of these admissions but other police officers in the identical area failed to hear any such admissions.

(3) As to the alleged medical evidence, since the corpse has been suppressed, there can be no medical evidence since all of the medical evidence at the earlier trial herein was based upon an autopsy of the deceased. Even if there were remaining some medical evidence, such evidence can hardly be considered overwhelming because, in the first place, it fails to establish any time of death or even any cause of death with any certainty whatever and, secondly, even if the medical evidence were totally probative, it would do nothing but establish the time of death and the cause of death but would not include any evidence linking respondent to the death.

(4) As to the alleged request for an alibi made by the respondent to Arthur Hitt, which allegedly preceded Owen's telephone call to the police, that matter, even if not suppressed, is subject to the credibility of Arthur Hitt, a felon and once a suspect in the Velzy matter himself, the owner of the re-burial site, the supplier of the automobile and most of the other implements used in the re-burial attempt, and a police agent who was equipped with recording equipment for extensive periods of time (but who fails to explain why none of the alleged admissions obtained from respondent are recorded, but rather so unfortunately allegedly uttered at a time when conversations between Hitt and the respondent were not being recorded).

The claim that there exists other "circumstantial evidence linking the defendant to the deceased" (petition, p. 16) is simply too vague to deal with in any way.

Respondent fails to understand petitioner's reference (petition, p. 16) to suppressed evidence as somehow supporting the point that, given suppression, there remains overwhelming evidence of guilt.

In any case, any alleged statement to Hitt is subject to Hitt's credibility. The unsuppressed physical evidence is totally unprobative and irrelevant in most respects.

B. Hitt was clearly a police agent as a matter of fact and New York State law and as an alter ego of the police, he was not permitted to take any action that the police were not permitted to take in violation of respondent's New York State constitutional rights and any alleged admissions obtained by him can not serve as a valid basis for a search warrant.

Among the first things that become apparent in connection with petitioner's argument concerning the status of Arthur Hitt is that petitioner, without claiming that Section 60.45(2) of the New York State Criminal Procedure Law is unconstitutional under federal standards, is nonetheless asking this Court to review the determination of New York State's highest Court, interpreting New York law and deciding that Hitt was an agent as a matter of law under New York State law.

While it is apparently true that New York State law does not contain a specific definition of the term "police agent," it is also true that *People v. Cardona,* 41 NY2d 333 (1977), sets forth more than sufficient guidelines for a determination as to whether a particular individual is in the particular context of the case at issue "a police agent." Indeed, it would appear that it is virtually impossible to do more than set out considerations and guidelines concerning such a question and that a specific definition would be unworkable and useless.

The situation at bar does not authorize petitioner to create a definition of a police agent and, it is respectfully

submitted, petitioner has done just that at page 17 *et seq.* of the petition.

For instance, petitioner would create a definition that includes a question of whether the police were acting in good faith when they dispatched the non-police individual to act on their behalf, but such a proposition is found nowhere in New York law.

Assuming, *arguendo,* that the issue was and remains reviewable by this Court, it seems beyond dispute on this record that Hitt was not anything like the ordinary informer, as petitioner would have it, but was more like a police investigator himself, albeit without badge.

The most significant distinction between an informant and an agent would seem to be that an informant initiates contact with the police to impart incriminating information gathered by him without the active solicitation or assistance of police whereas the agent is one who is instructed, guided and sent out to operate in a certain manner with the purpose of obtaining incriminating information and/or proof.

In the case at bar, Hitt may well have given to the police some minor and dubious information in terms of appellant's alleged request for an alibi (after they had first approached *him*). This relatively minor disclosure, however, is totally consumed by the fact that Hitt was thereupon instructed, wired, sent out to meet with, cultivate, drink with and question respondent, as a result of which Hitt allegedly obtained from respondent a complete confession to a murder—information which he did not have prior to his recruitment by the police and which he only brought back to the police well after his initial recruitment.

Against the contention that Hitt could be somehow viewed as merely a cog in the wheel of the attempt to find a missing person, it is well to recollect here again that Hitt's attorney's clear interpretation was that Hitt's function was "to get Knapp."

Beyond this, it should not be overlooked that Hitt was, at the beginning of the investigation, a serious suspect himself, as evidenced by the fact that Hitt's logging site had been searched by the police. So that the situation can be accurately viewed, Hitt either went to the police (after they had first come to *him*) to make an arrangement in connection with his own dilemma—a prior felony record and multiple felony charges pending or with respect to his situation as a suspect with potential murder charge against himself. He was not one who even initially came to the police personally or through his attorney but rather can be viewed as one who was *turned* by the police from the position of a suspect, already destined for state prison on other charges, to the position of insulated agent, insulated both with respect to incarceration on his pending felony charges as well as arrest and incarceration in connection with the Velzy matter.

Petitioner's attempts to make the point that Hitt was not recruited by the police to circumvent respondent's right to counsel as it then existed, citing the fact that neither *People v. Rogers,* 48 NY2d 167 (1979), nor *People v. Skinner,* 52 NY2d 28 (1980), had been decided at that time; however, when it is recalled that respondent's counsel telephoned the police on December 15 or 16, he explicitly told the police that they were to either arrest respondent or cease their questioning of him. Under this interdiction, the police then could no longer implement their desire to question appellant arresting him, thereby placing him in custody.

The right to counsel, even at that time, would have attached to a situation where the police had placed appellant in custody, vis-a-vis the prior entering of the proceeding by respondent's attorney. See *People v. Donovan*, 13 NY2d 148 (1963); *People v. Gunner*, 15 NY2d 226 (1965).

The only way that the police could continue to question respondent was to circumvent his right to counsel which would attach upon his being placed in custody, by leaving him free to have him questioned by a police agent while free.

The police themselves seem clearly to have recognized the constitutional problem created by the telephone call from Owen. If they did not, they would have gone right on questioning respondent directly instead of completing Hitt's recruitment (apparently within 24 hours of the phone call), and continuing their questioning surreptitiously. Cf. *People v. Ferrara*, 54 NY2d 498, 508 (1981).

Concerning the warrant and the physical evidence seized as a result thereof, the evidence so seized is inadmissible upon multiple grounds although it was only necessary for the Court of Appeals to determine that it was inadmissible on the grounds of Hitt's status as an agent of the police and his inadmissible statement in support of the warrant. However, there were raised in the Court of Appeals, as there was in the lower Courts, contentions that the evidence seized pursuant to the warrant was also inadmissible in view of the fact that the warrant was based in significant part upon the inadmissible confession allegedly procured by the police from the appellant at the State Police Headquarters following his arrest. Defects in the warrant itself and other issues were also raised but which were obviously not necessary for the decision reached by

the Court of Appeals, which rested its decision to suppress the physical evidence on the other grounds.

Concerning *Massiah v. United States*, 377 U. S. 201 (1964), it should be noted that, even if *Massiah* is (irrelevantly) distinguishable from the case at bar, the Court of Appeals pains to point out specifically that the decision there was made upon the basis of respondent's *State* constitutional rights (majority opinion, pp. 1 and 8) and not on the basis of whatever his federal constitutional rights might be; and it appears to be of some significance that *Massiah* was not cited in the majority opinion but only in the concurring opinion of Judge Meyer.

Moreover, *Massiah* is in fact distinguishable on the basis that Massiah was under indictment at the pertinent time whereas respondent here was not. The indictment in *Massiah* and under *federal* law *at that time* represented the earliest moment of the right to counsel, but, under New York law, the right to counsel is triggered much earlier as a result of the authority of *Rogers* and *Skinner*.

The holding that Hitt was a police agent does nothing to handcuff the police in that the police remain totally free to accept the contributions of ordinary informants. It is only when they convert the status of such an informer to that of an agent and set him to work for them in a constitutionally impermissible manner, that they can be considered to be hampered in any way, and then more than justifiably so.

C. A decision of New York's highest Court which is specifically limited to interpretation of respondent's New York State constitutional rights as they relate to certain of the so-called exclusionary rules is not a proper vehicle for this Court to review the federal exclusionary rules.

It is respectfully submitted that, under our system of government, the people of each state are free to adopt their own State Constitutions, the Courts of each State are permitted to interpret those State Constitutions and such interpretations are unreviewable by this Court only to the extent that such interpretations run afoul of the United States Constitution.

In the subject petition, petitioner is asking this Court to interpret the rights of individuals in the State of New York under the New York State Constitution, there being no claim that those rights as interpreted by the Courts of the State of New York are in any way in conflict with any requirements of the United States Constitution.

Petitioner makes not a legal argument but rather a policy argument based upon the attitude of certain groups in American society toward the so-called exclusionary rules.

It is well known that for some time such groups have been seeking a proper vehicle to provide the basis for an authoritative review of the exclusionary rules.

Yet, it is respectfully submitted that such advocates must find a proper vehicle to review the federal exclusionary rules and another means if they wish a further review of those rules by New York State's system of

justice, beyond that represented by such precedents as *People v. Rogers, People v. Skinner* and the instant case.

Moreover, petitioner advocates only one side of the issue—that concerning the supposed hamstringing of law enforcement agencies—ignoring the rights of individuals facing the massive force of the State (of which the combined police investigation here involved is an excellent example) and their right to retain legal counsel to deal with the State and the right, if such procedures are disregarded, to have the tainted fruits of such unlawful activity excised from the evidence upon trial.

Petitioner goes on at great length about supposed good faith upon the part of the police (a factor not presently installed either in federal or New York law, to the best of respondent's knowledge) while overlooking the fact that respondent here, to the certain knowledge of the police in the rural area involved, had the services of an attorney in connection with a well-publicized prior criminal case which attorney-client relationship was, also to the certain knowledge of the police, still subsisting with the criminal case to which it related still pending, and with respondent having given ample evidence as early as December 12, 1977, that he felt totally inadequate to deal with the police without the aid of his counsel.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated: Oneonta, New York
March 28, 1983

Respectfully submitted,

ROBERT P. NYDAM
Counsel to Respondent